IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CHARLES E. BOWDEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner Charles E. Bowden respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 24, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. An order rendered by the District Court for the Western District of Washington also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 24, 1971. No petition for rehearing was filed. This petition for certiorari was filed

within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the immunity provisions embodied in Title II of the Organized Crime Control Act of 1970, (18 U.S.C. §6001 *et seq.*) are coextensive with the Fifth Amendment privilege against self-incrimination. Stated otherwise, whether a witness can be compelled to testify over the assertion of his Fifth Amendment rights—his only protection being a prohibition against direct or indirect use of his testimony against him in a criminal prosecution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002 and 6003, provides:

> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> "(1) a court or grand jury of the United States,
>
> "(2) an agency of the United States, or
>
> "(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimi-

nation; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.".

"§6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

Section 301(a) of the Organized Crime Control Act of 1970, 84 Stat. 933, 28 U.S.C. 1826, provides:

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon

such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

STATEMENT OF THE CASE

On January 8, 1971, Mr. Charles E. Bowden, the Petitioner, was served with a subpoena *ad testificandum* directing him to appear on January 12, 1971 before a Federal Grand Jury sitting in Seattle, Washington. The Grand Jury was investigating alleged violations of antitrust laws.

Attorneys for the Petitioner filed a motion to quash the subpoena or in the alternative to deny or set aside any court order compelling his testimony which might be requested by the Government pursuant to Title II of the Organized Crime Control Act of 1970 (18 U.S.C §6001 *et seq.*). On January 12, 1971, a hearing on the witness' motion was held before the Honorable William J. Lindberg, United States District Judge. At this proceeding the government requested the court enter an order compelling

the witness to testify pursuant to 18 U.S.C. §6003(b)(2). The hearing was continued until January 13, 1971.

After the proceedings reconvened, the court denied the witness' motion to quash and the Government's request that an order in advance of the witness' appearance before the Grand Jury be issued compelling him to testify. The witness then appeared before the Grand Jury and after answering routine questions such as giving his name and address, refused to answer all other questions on the grounds that the questions violated rights guaranteed to him by the Fifth and Sixth Amendments to the Constitution of the United States. After the witness' appearance before the Grand Jury another hearing was held. The court in substance stated from the bench that the Government's request for an order compelling testimony had been renewed and decided to "reserve ruling until after argument."

Subsequent to the submission of briefs and prior to oral argument, the United States Court of Appeals for the Ninth Circuit rendered an opinion in *Stewart v. United States*, 440 F.2d 954 (1971), *cert. granted, sub. nom. Kastigar v. United States*, 39 U.S. L. WEEK 3511 (U.S. May 17, 1971) (No. 1562), which upheld the constitutionality of the immunity provisions embodied in the Organized Crime Control Act of 1970.[1] In an order dated April 27, 1971, a copy of which is set forth in Appendix C, the District Court per the Honorable George Boldt[2]

1. This Court has agreed to hear two cases arising from State Courts which present substantially the same issue as presented by the case at bar. These two cases are *Sarno v. Illinois*, 39 U.S. L. WEEK 3375 (U.S. March 2, 1971 (No. 565) and *Zicarelli v. New Jersey State Comm'n of Investigation*, 39 U.S. L. WEEK 3375 (U.S. March 2, 1971) (No. 91).

2. During the interim period between the initial hearing and the scheduled date of our argument, the Honorable William J. Lindberg assumed the status of a Senior Judge. The instant matter was transferred to Judge Boldt.

granted the witness immunity pursuant to the provisions of the Crime Control Act and ordered the witness to testify before the Grand Jury. A court order dated April 19, 1971 which granted the Government's application for an immunity order referred to the *Stewart* decision and provided in part:

> "This court deeming itself bound by the decision of the United States Court of Appeals for the Ninth Circuit rules that the immunity provisions of the Organized Crime Control Act are constitutional and accordingly grants the Government's application for an order granting immunity and ordering the witness to testify pursuant to said act."

On April 27, 1971, the petitioner appeared before the Grand Jury. The witness was asked a series of questions, all of which he refused to answer on the basis of the Fifth and Sixth Amendments to the Constitution of the United States. In a hearing, convened in Judge Boldt's chambers, the court ascertained that the witness had refused to testify and held the witness to be in contempt. The court further ruled that the witness would not be placed in confinement in view of the contemplated appeal of the contempt citation.

The decision of the District Court was appealed to the United States Court of Appeals for the Ninth Circuit. On June 24, 1971, the Court of Appeals affirmed the order of the District Court citing its decision in *Stewart v. United States*, *supra*, and *Charleston v. United States*, Civil No. 71-1787, 9th Cir., June 16, 1971.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decision of Another Court of Appeals as to the Constitutionality of the Immunity Provisions of the Organized Crime Control Act of 1970

The United States Court of Appeals for the Seventh Circuit has ruled that the immunity provisions of the Organized Crime Control Act of 1970 are unconstitutional.[3] *In re Korman,* Civil No. 71-1328, 7th Cir., May 20, 1971, *petition for cert. filed* 39 U.S. L. WEEK 2681 (U.S. June 30, 1971) (No. 1848). In that case the court cited *Stewart v. United States, supra,* and expressly recognized that the *Stewart* decision was in conflict with the case there at bar.[4]

Subsequent to *Korman* the Court of Appeals for the Ninth Circuit in *Charleston v. United States, supra,* again sustained the constitutionality of the immunity provisions embodied in the Organized Crime Control Act. In *Charleston* the Court explicitly recognized that the Seventh Circuit in *Korman* had reached a contrary conclusion. The instant Petitioner also cited *Korman* in his brief to the Ninth Circuit. Thus, it is clear that the Court of Appeals for the Ninth Circuit has decided not to reverse the position it took in *Stewart* in order to avoid a conflict between circuits.

These conflicts justify the grant of certiorari to review the judgment below.

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3. The United States District Court for the Southern District of New York has also held these statutes to be unconstitutional. *In re Kinoy,* 326 F. Supp. 407 (S.D.N.Y. 1971).

4. This court recognized the importance of the issue presented in the instant case by granting certiorari in *Stewart.* We respectfully urge that similar action be taken with respect to this petition.

2. The Decision Below Resolved a Federal Question in a Way Which Conflicts with Applicable Decisions of This Court

The basic standards governing the constitutionality of immunity statutes were established by this Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). In *Counselman* this Court stated in part:

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. §860 of the Revised Statutes does not supply a complete protection from all of the perils against which the constitutional prohibition was designed to guard, and is not a full substitution for the prohibition. *In view of the constitutional provision, a statutory enactment, to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.*" *Id.* at 585-586. (Emphasis added)

Subsequent to *Counselman*, many decisions of this Court have expressed approval of *Counselman* or the basic principles contained in that decision. *See, Stevens v. Marks*, 383 U.S. 234 (1966); *Albertson v. SACB*, 382 U.S. 70 (1965); *Reina v. United States*, 364 U.S. 507 (1960); *Brown v. United States*, 359 U.S. 41 (1959); *Ullman v United States*, 350 U.S. 422 (1956); *Adams v. Maryland*, 347 U.S. 179 (1954); *Smith v. United States*, 337 U.S. 137 (1949); *United States v. Monia*, 317 U.S. 424 (1943; *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Hale v. Henkel*, 201 U.S. 43 (1906); *Brown v. Walker*, 161 U.S. 591 (1896).

The Court below, basing its rationale on *Murphy v. Waterfront Comm. of New York*, 378 U.S. 52 (1964),

concluded the statements in *Counselman* that an immunity statute must provide absolute immunity from prosecution were no longer viable and need not be followed. *Stewart v. United States, supra,* at 955-957. We believe the reasoning in *Stewart* to be incorrect and have so argued to the courts below. Many of the reasons for this belief are set forth in *In re Korman, supra,* and in *In re Kinoy, supra.*

The judgment below is in conflict with decisions of this Court and we urge that this conflict justifies granting certiorari to review the decision of the Court of Appeals.

3. The Instant Case Presents an Important Question of Constitutional Law Which Should Be Decided By This Court

The instant case presents this Court with an issue involving the character and role which the privilege against self-incrimination is to have in our modern society. In terms of public policy, this question is much the same as the one which confronted the drafters of the Bill of Rights in promulgating the Fifth Amendment. To be determined is whether society's need for information contained in the mind of a potential criminal defendant is so great that it justifies stripping a criminal defendant of his first line of defense, the right to remain silent, while leaving him still subject to future prosecution. Also at issue is whether Americans should have a constitutionally protected right of intellectual privacy. A prosecutor must establish "probable cause" before searching a person's chattels, yet under the position espoused by the Government it would be con-

stitutionally permissible to search a persons' mind with virtual impunity.[5]

Many recent decisions of this Court have dealt with situations in which the accused has made an incriminating statement, e.g., *Miranda v. Arizona,* 384 U.S. 436 (1966). In contrast, this Petitioner has at all times remained silent. Thus, the basic question here to be determined is under what circumstances may a government *lawfully* compel an individual to speak, notwithstanding an assertion of the privilege against self-incrimination. The resolution of this issue will delimit the perimeters of this constitutional right uncomplicated by collateral questions such as waiver of the privilege or the application of an exclusionary rule.

An important related question involves the mode of constitutional analysis employed in deciding this question. Some of the lower courts, when confronted with the issue at bar, have in effect determined that the scope of the privilege is coterminous with the remedy for its violation.[6] Apparently, these courts have been persuaded by analogies to cases which apply "exclusionary rules" to sit-

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5. The requirement that a witness be granted immunity from prosecution (transactional immunity) as a condition for compelling testimony serves to restrain prosecutors from indiscriminate use of their power to compel testimony in abuse of their discretion. Transactional immunity in this regard functions in a manner analogus to the probable cause provision of the Fourth Amendment both which deter prosecutors from going on "fishing expeditions."

6. As a part of its analysis the Court of Appeals relied upon *Wong Sun v. United States,* 371 U.S. 471 (1963), a case which barred the admission of certain "tainted" evidence found to be the product of an unlawful search and seizure. *Stewart v. United States, supra* at 957 n.5. The California Supreme Court in *Byers v. Justice Court,* 458 P.2d 465 (Cal. 1969) *re'vd. sub nom. on other grounds California v. Byers,* 91 S. Ct. 1535 (1971) also relied on cases involving the exclusion of unlawfully obtained evidence to find that the privilege against self-incrimination may be supplanted by a rule which proscribes direct or indirect use of compelled testimony (use immunity).

uations involving unlawful searches and seizures and unlawfully obtained confessions. Such reasoning is not sound and will result in a substantial erosion of the privilege against self-incrimination.

Exclusionary rules are properly applied in "after-the-fact" situations in which there has been a violation of a constitutional right. In such situations, courts are faced with the dilemma of preserving fundamental constitutional guarantees of an accused on one hand, while on the other, assuring that society's interest in bringing criminals to justice is not frustrated. These rules were designed to ameliorate the harm caused by unconstitutional acts, yet enable society to prosecute alleged criminals.

The policies underlining the exclusionary rules are remedial in character, designed to undo harm already done. In the instant case, no harm has been done, since the witness' privilege against self-incrimination remains intact. The policies underlying use immunity—to provide the government with an investigatory tool—are not remedial in character. Therefore, the remedial policies of exclusionary rules are not germane to the issue in the instant case and analogies to exclusionary cases to support the constitutionality of use immunity are logically unsound.

The rationale employed by the lower courts substantially limit the effect of the privilege against self-incrimination by reasoning that the scope of the right is no broader than the remedy for its violation.[7] From this premise,

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7. A determination that an exclusionary rule is an adequate substitute for the privilege against self-incrimination could result in a breakdown of other rights. For example, under this rational an "immunity statute" could be passed which directs magistrates to issue search warrants not based on probable cause, provided that the evidence seized and the fruits thereof are inadmissible in a criminal prosecution.

these courts have concluded that the remedy may be lawfully substituted for the right. The effect of this is to give the privilege against self-incrimination a force of law no greater than a rule of evidence.

We urge that the importance of the constitutional question presented justifies the granting of certiorari to review the judgment of the court below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.[8]

Respectfully submitted,

CHARLES S. MULLEN
THOMAS W. TOP
FREDERICK O. FREDERICKSON
Counsel for Petitioner

July, 1971

8. In its petition for a writ of certiorari in *Korman*, the United States requested that action on the petition be delayed until after a decision is reached in *Kastigar v. United States*, *supra*. Petition of the United States, p. 4, *In re Korman*, *supra*. Anticipating that the Government will take a similar position with respect to the instant petition we respectfully urge this Court not to grant such a request. We believe this case to be of great constitutional significance and as such should be decided on the basis of the most thorough and comprehensive analysis possible. In this regard we note that the instant petition arose from an antitrust investigation and we believe that viewing the challenged statutes from this perspective may very well provide us with insights and arguments materially different from those of counsel representing witnesses involved with other types of grand jury investigations. *Counselman v. Hitchcock*, *supra*, as well as other leading cases involving immunity statutes arose in a business context. e.g. *Hale v. Henkel*, *supra*, (antitrust) and *Brown v. Walker*, *supra*. To insure that all viewpoints and arguments are fully and completely presented, we respectfully urge this court to adopt a policy allowing all petitioners to submit briefs and to grant certiorari with respect to the present petition.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 71-1808

IN THE MATTER OF CHARLES E. BOWDEN,
WITNESS BEFORE GRAND JURY OF THE
WESTERN DISTRICT OF WASHINGTON

Appeal from the United States District Court for the Western District of Washington.

June 24, 1971

Before KOELSCH, HUFSTEDLER and WRIGHT, Circuit Judges *per curiam.*

The order of the district court adjudging Charles E. Bowden guilty of civil contempt and directing his confinement, pursuant to 28 U.S.C. §1826, is affirmed. *Stewart v. United States,* ..... F.2d ..... (9th Cir., May 18, 1971); *Charleston v. United States,* ..... F.2d ..... (9th Cir., June 16, 1971).

A petition for rehearing will not be entertained. Issuance of a mandate is stayed for thirty days to enable appellant to apply for a writ of certiorari. If timely application for such writ is filed, the stay shall remain in effect until the application is denied or, if granted, pending determination of the cause by the Supreme Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE GRAND JURY PROCEEDINGS IN THE MATTER OF CHARLES E. BOWDEN

Judgment of Contempt, April 27, 1971

The witness, Charles E. Bowden, having been served with a grand jury subpoena *ad testificandum* issued by this Court, appeared before a federal grand jury sitting in this district on January 13, 1971 and was duly sworn. In response to a series of questions said witness refused to answer, claiming his Fifth Amendment privilege against self-incrimination. On April 27, 1971 said witness was served with a written order of this Court granting him immunity pursuant to the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §6001 *et seq.* (Public Law 91-452), and he again refused to testify before said grand jury on said grounds. Thereafter, on April 27, 1971 said witness, accompanied by his counsel, appeared before this Court and was thereupon ordered to testify, at which time said witness in the presence of this Court refused to comply with this Court's oral order to testify.

NOW, THEREFORE, IT IS ORDERED:

1. That, pursuant to the provisions of Title III of the Organized Crime Control Act, the witness is adjudged in civil contempt of this Court committed in the presence of this Court, and that he shall be confined at a place to be determined by the Attorney General or his authorized representative until such time as he is willing to testify before said grand jury, but not to exceed the life of the term of said grand jury;

2. Execution of this order is to be stayed upon appeal of this order until 60 days after the mandate is returned to this Court; and

3. Execution of this order is to be permanently suspended should the witness purge himself by rendering his testimony before the said grand jury at any time prior to the expiration of the 60 day period after return of the mandate.

/s/ GEORGE H. BOLDT
United States District Judge

Dated: April 27, 1971

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE GRAND JURY PROCEEDINGS IN THE MATTER OF CHARLES E. BOWDEN

Order

Upon the application of the United States Attorney for the Western District of Washington for an order to require testimony of a witness before the grand jury pursuant to Public Law 91-452 (entitled "The Organized Crime Control Act of 1970"); and it being represented by the Government that Assistant Attorney General of the United States Richard W. McLaren has approved this application, it being his judgment that the testimony from CHARLES E. BOWDEN may be necessary to the public interest; and it appearing to the Court that CHARLES E. BOWDEN in the course of grand jury proceedings in the Western District of Washington, has refused, under oath, to answer certain questions propounded to or give testimony on the basis of Fifth and Sixth Amendments to the Constitution of the United States.

THEREFORE, IT IS HEREBY ORDERED THAT: In accordance with the Organized Crime Control Act of 1970, 18 U.S.C. §6001 *et seq.* (Public Law 91-452), CHARLES E. BOWDEN give testimony or provide other information before the grand jury, that any testimony given by CHARLES E. BOWDEN pursuant to this order shall be subject to the immunity provision of the Organized Crime Control Act of 1970 as provided in 18 U.S.C. §6002.

DATED this 27the day of April 1971.

/s/ GEORGE H. BOLDT
United States District Judge